Supreme Court, U.S.
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No. 99-127

IN THE

Supreme Court of the United States

LARRY D. BACH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT

A. This Case Does Squarely Present The Issue Upon Which Petitioner Seeks Review.

The Brief of the United States in Opposition to Defendant's Petition For A Writ of Certiorari argues in its essence that this case does not squarely present the question of whether the *Ex Post Facto* Clause bars the application of the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. §§ 3663A and 3664 (Supp. III 1997), because Petitioner was found to have the ability to make restitution and thus was not disadvantaged by the application of the MVRA. (Opp. Brief at p. 6). To the contrary, Petitioner was clearly disadvantaged. Petitioner has been saddled with a most onerous mandatory restitution obligation by reason of the Seventh Circuit's affirmance of the District Court's application of the MVRA to Petitioners' case. The Seventh Circuit's affirmance of the District Court's judgment sentencing Petitioner did not address Petitioner's challenge to the District Court's alternative finding and conclusion that Petitioner had the ability to immediately pay restitution of $674,325.84. Thus, Petitioner has clearly been disadvantaged because he has been sentenced to pay a substantial restitution sum immediately without regard to his ability to pay that sum. Most certainly this makes Petitioner's punishment for the crime more burdensome, and thus clearly triggers *ex post facto* concerns. *Dobbert v. Florida*, 432 U.S. 282, 292 (1977).

The United States attempts to distinguish Petitioner's reliance on *Lindsey v. Washington*, 301 U.S. 397 (1937), contending that it was not simply a theoretical possibility that Petitioner would be ordered to pay restitution as the District Court rejected Petitioner's contention that he had

no ability to pay restitution. (Opp. Brief at p. 7). Petitioner does not disagree that he was likely to be subject to a restitution order but not one of the onerous magnitude with which he has been shouldered by reason of the application of the MVRA. The record in this case raises a distinct and realistic possibility that the District Court's finding of Petitioner's ability to pay would not justify upholding under the Victim and Witness Protection Acto of 1982 ("VWPA"), 18 U.S.C. § 3663(a), the onerous restitution imposed upon him, over $600,000 payable immediately.

The sole finding of the District Court as to Petitioner's ability to pay restitution under VWPA is the excerpt quoted at page 6 of the Brief of the United States in Opposition, namely that Petitioner "had the capacity, given his current and past entrepreneurial enterprises, to make restitution." This finding stood in sharp contrast to the District Court's approbation of Petitioner at sentencing that the Defendant had no demonstrated history of making an honest buck[1]. The July 1998 revised Presentence Report ("PSR") record before the District Court indicated that Petitioner would be 60 years old when released; that his educational experience was high school and a few college semesters; that his past entrepreneurial ventures resulted in a bankrupt real estate business and his being banned from securities sales; that he will come out of prison saddled with a mail fraud conviction that imposes a significant impediment to his gaining any meaningful employment with others; that he filed bankruptcy, along with his wife, in 1988 and 1997; that at the time of sentencing he had a net worth of some $22,000, a net monthly income together with his spouse of $544, and

1. Reprinted in the Appendix to this Reply Brief at 1a is the excerpt from the transcript of Petitioner's sentencing hearing reflecting this view of the District Court.

that his wife's business where he was employed had a negative total equity of some $158,000 and a negative net income of some $81,000. Moreover, the PSR reported that Petitioner, his wife, and his now defunct energy company had previously disgorged $452,318.42 in the 1992 SEC action against them to pay claims.

The imposed restitution obligation of over $600,000, due immediately from Petitioner, who began serving a 30 month imprisonment sentence on October 14, 1998, is, on its face, impossible for Petitioner to meet, and as such presents a very serious question of whether it could ever be a valid restitution order that would be affirmed by the Seventh Circuit Court of Appeals. *See e.g.*, *United States v. Lampien*, 89 F.3d 1316, 1323 (7th Cir. 1996)[2], collecting cases from the Second, Third, Fourth, Ninth and Eleventh Circuits, as well as other Seventh Circuit cases, and observing that appellate courts have not hesitated to vacate restitution orders as sham orders where the record clearly indicates that the defendant is unable to satisfy the order because such orders defeat any hope of restitution, impede the rehabilitative process and threaten the respect for judicial orders generally.

Thus, this case squarely presents a compelling case to decide the question of whether the MVRA was unconstitutionally applied to Petitioner. If the MVRA cannot be constitutionally applied to Petitioners' case, then Petitioner's restitution obligation must consider his ability to pay. The record in this case raises serious questions whether the District Court's "ability to pay" finding,

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2. *Lampien* involved the rejection of a restitution order under VWPA of almost $500,000 imposed on a 60 year old defendant convicted of embezzlement who had only a pension and nominal social security income, limited work experience and poor health.

subjecting Petitioner to an immediately payable restitution order of over $600,000, can withstand scrutiny. Petitioner is thus clearly disadvantaged by the application of the MVRA to his case as Petitioner has been deprived of the right of having his ability to pay rightfully considered in determining the amount of restitution he should pay.

B. Petitioner Did Not Waive His Right To Raise The Issue.

The Brief of the United States in Opposition to Defendant's Petition For A Writ of Certiorari argues that Petitioner, by stipulating in his plea agreement that "restitution is appropriate", waived the right to raise before this Court the constitutionality of the retroactive application of the MVRA to his case. (Opp. Br. at p. 8). This argument is based upon a mischaracterization of the record in this case. Petitioner did agree in his plea agreement that restitution is appropriate, as it always is in fraud loss cases. Petitioner did not, however, agree on the extent of restitution nor that he had any ability to pay any significant restitution sum. Nor did Petitioner stipulate in his plea agreement that the MVRA applied to his case. Petitioner's PSR never said that the Mandatory Victim Restitution Act applied, but rather applied the VWPA to Petitioner's case. Only after the United States belatedly raised issue of the MVRA did the federal Probation Office issue an addendum three days prior to the sentencing hearing saying that the MVRA applied[3]. Petitioner immediately filed an objection to the application of the MVRA. Further, in the underlying appeal, the United States never argued that Petitioner waived this issue, nor did the opinion of the Seventh Circuit Court of Appeals find waiver

3. Reprinted in the Appendix to this Reply Brief at 4a is that addendum.

by Petitioner in its affirmance of the District Court's application of the MVRA to Petitioner's case.

C. Whether The Ex Post Facto Clause Bars The Retroactive Application of the MVRA Is Not An Insignificant Question.

The Brief of the United States in Opposition to Defendant's Petition for a Writ of Certiorari argues that the constitutionality of applying MVRA retroactively is of diminishing significance in criminal cases generally in that it is only relevant to offenders committing offenses before April 24, 1996, thereby limiting the number of offenders potentially affected by the question and ultimately the number of case in which the MVRA might made a difference. (Opp. Br. at p. 8). To the contrary, review is warranted. The strength of our constitutional protections should not depend upon the number of persons who might be affected by their application. Moreover, it is clear from the number of cases that have addressed this issue through all of the Circuit Courts of Appeal, numerous offenders have been affected by this question. Regrettably, only offenders, like Petitioner, who ended up being prosecuted in the jurisdictions of the Tenth and Seventh Circuits, have been subjected to the retroactive application of the MVRA. The argument of the United States is that just because a few offenders have had their constitutional rights violated, they should not have their constitutional rights vindicated. Interestingly, Petitioner's offense conduct took place in Louisiana, the geographic jurisdiction of the Fifth Circuit. Had Petitioner been prosecuted in that jurisdiction, or in any other jurisdiction outside the Tenth and Seventh Circuit where the investors resided, Petitioner would not have been subjected to a mandatory restitution sentence.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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